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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-117
Streamlining the Commission's	)	
Rules and Regulations for Satellite	)	
Application and Licensing Procedures	)	

PETITION FOR RECONSIDERATION OF TELQUEST VENTURES, INC.

TELQUEST VENTURES, INC.

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March 12, 1997

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SUMMARY

Although the 91° W.L. DBS orbital position which has been assigned to Canada could technically be used for broadcast services in the United States, the spectrum had not been allocated for such use and effectively belonged to no one. In fact, prior to TelQuest's filing of its earth station applications, nobody had proposed to use that spectrum to provide video programming to the United States. TelQuest spent a substantial amount of time and money to apply that spectrum to productive use. Through these efforts, TelQuest acquired a property interest in this DBS spectrum and the right to obtain an FCC license to use it; rights that are protected by the Fifth Amendment of the U.S. Constitution and which may not be taken without due process and just compensation. TelQuest has an entitlement to an FCC license because the Communications Act requires the Commission to grant licenses if it will serve the public interest, promote competition and the introduction of new services, and eliminate market entry barriers for women-owned, small businesses and ensure their participation in spectrum based services. 47 U.S.C. §§ 157, 257, 309(a), and 309(j). The grant of TelQuest's applications is mandated by the "existing rules and understandings" embodied in the Communications Act.

TelQuest's earth station applications were summarily dismissed by the International Bureau without any consideration of their merits or the public interest in their grant on the basis of a prior satellite licensing requirement. This requirement completely barred TelQuest from entering the DBS market as it placed TelQuest in a classic Catch-22: the Canadian satellite license was conditional upon an FCC authorization, but the FCC refused to grant such a license until TelQuest satisfied all the conditions of the Canadian authorization, which in turn required

an FCC license. TelQuest had no notice of such a requirement as it was announced in two unpublished letters. Earlier applications filed by others had never been subject to such a requirement. Following the dismissal of TelQuest's applications, the Commission in this proceeding incorporated into its new FCC Form 312 the same prior satellite licensing requirement, without the notice and opportunity for comment required by the APA and procedural due process.

As explained below, these government actions have effected a taking of TelQuest's property interests in this DBS spectrum without just compensation in violation of the Fifth Amendment. They have also unlawfully foreclosed TelQuest from exercising its First Amendment right to speak to the American people using a DBS service. TelQuest has also been deprived of its liberty to provide DBS service to the American public without procedural due process required by the Fifth Amendment. On reconsideration of the prior satellite licensing requirement the Commission should reinstate and grant TelQuest's earth station applications to cure this deprivation of TelQuest's constitutional rights.

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TelQuest Ventures, Inc., [1] by its attorney and pursuant to 47 C.F.R.§ 1.429, respectfully submits this Petition for Reconsideration of the Commission's Report and Order, FCC 96-425 (released December 16, 1996) in the above-captioned proceeding, (hereinafter referred to as the Report and Order).[2] For the reasons set forth herein, TelQuest respectfully requests that the Commission reconsider and vacate the prior satellite licensing requirement adopted in the above-captioned proceeding and reinstate and grant its earth station applications.[3]

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[1] On December 31, 1996, TelQuest Ventures, L.L.C. assigned to TelQuest Ventures, Inc. all of its right, title and interest in, to and under the earth station applications. TelQuest Ventures, Inc. is a Delaware corporation that qualifies as a small business and 62% of its voting stock is owned by women. All of the shareholders, officers and directors of TelQuest Ventures, Inc. are U.S. citizens. For purposes, hereof, TelQuest Ventures, L.L.C. together with TelQuest Ventures, Inc. shall be referred to as ("TelQuest").

[2] 62 Fed. Reg. 5924 (February 10, 1997).

[3] TelQuest is filing with the Commission contemporaneously herewith a motion to stay the Report and Order.

I. INTRODUCTION.

On March 13, 1996, TelQuest filed applications with the Commission for authorization to operate a transmit earth station to communicate with Direct Broadcast Satellite ("DBS") satellites to be located at the 91° W.L. orbital position assigned to Canada and for a blanket authorization to cover all of the small receive-only earth stations that will be used by U.S. consumers to receive TelQuest's programming. TelQuest spent millions of dollars in hiring employees, leasing facilities, and prosecuting its license applications in order to provide the American public a video service not available today, a hybrid DBS/MMDS/cable service that also offers local television programming in small towns and rural areas as well as major markets.

According to a formal survey conducted by Hart-Riehle-Hartwig last year, more than 70% of Americans surveyed expressed a strong interest in TelQuest's new satellite service and supported issuing TelQuest a license.[4] More than seven in ten found the following reasons for issuing TelQuest a license to be persuasive:

(1) Because competition generally creates more choices and better services and products at a lower cost to consumers, government should encourage competition without delay;

(2) Consumers should have the right to choose new direct satellite TV services without the government interfering; and

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[4] TelQuest Application for Review, Exhibit 3, File Nos. 758-DSE-P/L-96 and 759-DSE-P/L-96 (filed November 29, 1996).

(3) Small companies willing to take on the large media by offering new services such as TelQuest should be encouraged to compete, not blocked by government delays.

A study by the Economic Strategy Institute found that the industry-wide impact of TelQuest's new competitive DBS system in the United States would cut average cable rates by 10% and increase by 5% the number of households that have all types of video programming.[5] Between the years 1998 and 2000, the Economic Strategy Institute estimated that the total market number of video programming subscribers would increase by as many as 600,000, generate as much as $5 billion in new spending on multichannel TV, and create as many as 100,000 new jobs because of the multiplier effect that a robustly competitive DBS system would have throughout the economy.[6]

The FCC's International Bureau dismissed TelQuest's DBS earth station applications on the basis of a new Commission rule that bars the filing of earth station applications proposing to communicate with satellites that have not satisfied all the conditions of their satellite licenses, In re the Application of TelQuest Ventures, L.L.C., Report and Order, 11 FCC Rcd. 8151, recon. denied, 11 FCC Rcd. 13943 (1996), application for review filed (November 29, 1996). TelQuest's application for review of that dismissal remains pending before the Commission. Following the dismissal of TelQuest's earth station applications and the filing of its application for review, the Commission added this prior satellite licensing requirement in the above-

[5] Id. at Exhibit 2.

[6] Id.

captioned proceeding to item 22 and exhibit B, items B.2 and B.3, of its new FCC Form 312 and accompanying instructions. Report and Order at Appendix C. [7]

Item 22 of the new FCC Form 312 requires an earth station applicant to identify whether it will communicate with a satellite "licensed" by the United States or a foreign country. If the earth station will operate with a satellite "licensed" by a foreign country, the earth station applicant must complete items B2 and B3 on Schedule B. Items B2 and B3 then require the applicant to identify the name and orbital location of each "licensed" satellite and list the countries that the earth station will provide service to using non-U.S. "licensed" satellites. The FCC also extended the prior satellite licensing requirement to item B6, which requests information concerning the satellite orbital arc range and frequency band limits over which the satellites will operate.

II. ADMINISTRATIVE PROCEDURES ACT.

A. Adoption of the Prior Satellite Licensing Requirement Did Not Comply With the Notice and Comment Provisions of the Administrative Procedure Act.

Agencies must include in their notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). And they must give "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C.§ 553(c). With

[7] TelQuest could not have participated earlier in this proceeding, not only because it was not in existence at the time comments and replies were filed, but as explained below, the Commission never provided notice that it was considering the adoption of a prior satellite licensing requirement in this proceeding.

respect to the adoption of the prior satellite licensing requirement, the Commission has done neither.

The Commission's Notice of Proposed Rulemaking, 10 FCC Rcd. 10624 (1995), did not contain the terms of the prior satellite licensing requirement the Commission later promulgated in its FCC Form 312, nor did it mention the issues involved in adopting such a requirement. The Commission's Notice of Proposed Rulemaking contains absolutely nothing to suggest that the Commission might adopt a prior satellite licensing requirement in the above-captioned proceeding. The subject is not touched upon in any of the rules proposed or the proposed FCC Form 312.

Item C6 of Schedule C of the proposed FCC Form 312 states: "Points of Communication (List Satellite Names)". Notice of Proposed Rulemaking, 10 FCC Rcd. at 10653. This is almost identical to item 11 of the current FCC Form 493 which was used by TelQuest to apply for its earth station construction permits. TelQuest's FCC Form 493 stated that its earth stations would communicate with a DBS satellite to be located at 91° W.L., which the International Telecommunications Union ("ITU") has named CAN BSS2. TelQuest's FCC Form 493 also identified the range of the satellite orbital arc and frequency band limits over which the satellite would operate. This is the only information on points of communication required by either the current FCC Form 493 or the FCC Form 312 proposed by the Commission in its Notice of Proposed Rulemaking.

According to the Commission's Notice of Proposed Rulemaking, the purpose of requiring information about points of communication is "to collect technical data that facilitates frequency coordination and ensures interference -free operations." Notice of Proposed Rulemaking, 10

FCC Rcd. at 10645. For purposes of information collection, nowhere does the proposed FCC Form 312 mention the word "licensed." None of the parties that participated in the rulemaking leading to the adoption of the new FCC Form 312 even mentioned a prior satellite licensing requirement for earth station applications.

The Commission also did not provide an adequate opportunity for comment. The Notice of Proposed Rulemaking sought comment about a proposed FCC Form 312 which did not incorporate a prior satellite licensing requirement. There was no indication in the Notice of Proposed Rulemaking that the Commission was soliciting comments from interested parties regarding a prior satellite licensing rule for earth station applicants.

It is obvious that the prior satellite licensing requirement incorporated in the new FCC Form 312 changed the substantive criteria for granting an earth station construction permit and permanently foreclosed TelQuest's plans to provide a DBS service to the American public. When regulations are adopted without adequate notice or opportunity for comment, the integrity of the administrative proceeding is so impaired that the regulation must be invalidated. National Black Media Coalition v. FCC, 791 F.2d 1016, 1022-1023 (2nd Cir. 1986); MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1143 (D.C. Cir. 1995); Kooritzky v. Reich, 17 F.3d 1509, 1513-1514 (D.C. Cir. 1994). Instituted without observing the notice and comment procedures mandated by the APA, the prior satellite licensing requirement for earth station applicants must be vacated.

B. The Prior Satellite Licensing Requirement is Arbitrary and Capricious.

Agency action that is arbitrary and capricious violates the APA. 5 U.S.C.§ 706. The prior satellite licensing requirement that the Commission has incorporated in its new FCC Form

312 places TelQuest in a classic Catch-22, a result that the U.S. Court of Appeals recently found to be arbitrary and capricious in violation of the APA. Southwestern Bell Telephone Co. v. FCC, 100 F.3d 1004, 1007 (D.C. Cir. 1996). While the Canadian Government conditions its license to use the 91° W.L. Canadian DBS orbital position to provide service to the United States on FCC authorization, the requirement that the Commission has incorporated into its new FCC Form 312 requires, as a prerequisite to an FCC earth station construction permit, that TelQuest satisfy all the conditions of the Canadian license, including the condition that TelQuest obtain an FCC authorization. Letter from John Manley, Canadian Minister of Industry, to Mr. L.J. Boisvert, President and Chief Executive Officer of Telesat Canada, February 27, 1996, attached hereto as Exhibit 1.

The prior satellite licensing rule is also arbitrary and capricious because it does not further the Commission's goals in the above-captioned proceeding. Bechtel v. FCC, 10 F.3d 875, 885-886 (D.C. Cir. 1993). The primary purpose of the rulemaking was to "decrease the regulatory burden on industry" and "to ensure that...service providers are not hampered by unnecessary . . . regulations." Notice of Proposed Rulemaking, 10 FCC Rcd. at 10631. The Commission intended its new FCC Form 312 to "free satellite service providers from unnecessary regulatory burdens, and enable them to respond more quickly to customers' needs." Report and Order at ¶ 2. The primary purpose of the rulemaking was to reduce regulatory burdens on earth station applicants, not to increase those burdens by imposing a new prior satellite licensing requirement. The prior satellite licensing requirement completely barred TelQuest from entering the DBS market and impeded its efforts to satisfy its customers' needs. Because the Commission, in adopting this new requirement, acted arbitrarily and capriciously, it

should reconsider its Report and Order, vacate that new requirement, and reinstate and grant TelQuest's applications.

III. THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

A. In Subjecting TelQuest to the Prior Satellite Licensing Requirement, the Commission has Violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

The Commission has violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution by depriving TelQuest of its "liberty" and "property" without due process. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use, without just compensation."

" Property" interests subject to procedural due process protection include a broad range of interests that are secured by "existing rules or understandings." Perry v. Sindermann, 92 S.Ct. 2694, 2699 (1972). The right "to engage in a particular trade or business" is "property" and "liberty" protected by the Due Process Clause of the Fifth Amendment. Greene v. McElroy, 79 S.Ct. 1400, 1411 (1959); Chalmers v. City of Los Angeles, 762 F.2d 753, 756-757 (9th Cir. 1985). Property interests protected by due process extend well beyond actual ownership of real estate, chattels or money. Goldsmith v. United States, 46 S.Ct. 215 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (right to obtain a retail liquor store license); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), cert. denied, 82 S.Ct. 368 (1961) (right to attend a public college).

The property interest conferred by on FCC license or the right to obtain a license is

distinguishable from a property interest in the spectrum itself. The U.S. Supreme Court has declared that "[n]o person is to have anything in the nature of a property right as a result of the granting of a license."[8] Section 301 of the Act similarly provides that "no license shall be construed to create any right, beyond the terms, conditions and periods of the license."[9] These statements, however, establish only that issuance of a license by the FCC does not by itself create a permanent ownership interest; they do not prohibit a private property interest in the spectrum or mean that the government holds title to all of the radio spectrum.

The FCC was originally created to bring order to the chaos which resulted from lack of coordination between broadcasters using the radio spectrum. The FCC does not own the spectrum, it merely coordinates its use.[10] Accordingly, it is only logical that the FCC's grant of a license cannot confer full-fledged ownership -- the FCC cannot grant that which it does not possess. The U.S. Court of Appeals for the District of Columbia has held that although an FCC license does not evince an outright ownership interest, it does indicate the existence of a limited and defeasible property interest. This finding is significant, in that it confirms that although an FCC license may not signify spectrum ownership, private parties may acquire a property interest in the use of spectrum.[11]

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[8] FCC v. Sanders Bros. Radio Station, 60 S. Ct. 693, 697 (1940).

[9] 47 U.S.C. § 301.

[10] See Columbia Broadcasting System, Inc. v. Democratic National Comm., 93 S. Ct. 2080, 2093 (1973).

[11] See Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664, 675 n. 19 (1987) ("a licensee's interest in a broadcast license . . . is not a full-fledged, indefeasible property interest, . . . *[b]ut neither is it a non-protected interest, defeasible at will.*") (emphasis added); L.B. Wilson v. FCC, 170 F.2d 793, 802 (1948) ("a broadcasting license confers a property right on its owner, although a limited and defeasible one.")

The property interest associated with an FCC license may not be the same as permanent ownership. However, this has not kept the U.S. Supreme Court from explicitly recognizing that the right to obtain an FCC license is an entitlement that qualifies as a "property" interest which may not be denied without procedural due process. See Goldberg v. Kelly, 90 S.Ct. 1011, 1017 (1970) ("[m]any of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and *channels for television stations*") (emphasis added).

Following the analysis in Perry v. Sindermann, the Communications Act requires the Commission to meet certain standards before depriving TelQuest of an earth station license. In determining whether to grant an earth station license, the FCC's overriding concern must be the public interest. 47 U.S.C.§§ 151, 157, and 309(a). See also, WSTE-TV, Inc. v. FCC, 566 F.2d 333, 337 (D.C. Cir. 1977). The Communications Act requires the Commission to grant licenses if it will promote competition and the introduction of new services, and eliminate market entry barriers for small businesses and ensure their participation in spectrum-based services. 47 U.S.C. §§ 157, 257, and 309(j). If the law requires an agency to apply a standard in order to take a certain action then those affected have a right to procedures that ensure the agency correctly applied that standard.[12]

During an agency adjudication, constitutional due process includes the right to have one's conduct judged by known criteria. "Due process requires that selection among applicants be

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[12] See Ashbacker Radio Corp. v. FCC, 66 S. Ct. 148, 150 (1945) (observing that the Commission is authorized to revoke, suspend, modify and limit the term of station licenses, but that the station licensee must be given an opportunity to be heard before any final action may be taken).

made in accordance with 'ascertainable standards.' " Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2nd Cir. 1968). The refusal to grant a license to one person when others have been granted licenses under similar circumstances constitutes a denial of equal protection of the laws. Hornsby v. Allen, 326 S.Ct. at 609.

TelQuest properly completed the FCC Form 493 for an earth station application and demonstrated that its new DBS service would serve the public interest. However, TelQuest's earth station applications were summarily dismissed by the International Bureau without any consideration of their merits or the public interest in their grant on the basis of a prior satellite licensing requirement. TelQuest had no notice of such a requirement as it was announced in two unpublished letters. Earlier applications filed by others had never been subject to such a requirement.[13] When TelQuest met with Scott Harris, then Chief of the Commission's International Bureau, prior to the filing of its earth station applications, it was never advised of a prior satellite licensing requirement. In fact, TelQuest had multiple conversations with the FCC, in which the FCC itself, advised TelQuest how to proceed.

During a rulemaking proceeding, constitutional due process requires an agency to comply with the APA's notice and comment procedures. Mobil Exploration and Producing North America, Inc. v. Federal Energy Regulatory Commission, 881 F.2d 193, 199 (5th Cir. 1989). As already described above, the Commission did not provide adequate notice or opportunity for

[13] TelQuest's Application for Review at 4-7; TelQuest's Consolidated Reply at 4, File Nos. 758-DSE-P/L-96 and 759-DSE-P/L-96 (filed December 26, 1996).

comment when, following the dismissal of TelQuest's applications, it incorporated into its new FCC Form 312 in this rulemaking proceeding, a prior satellite licensing requirement for earth station applications.

The prior satellite licensing requirement as applied to TelQuest's earth station applications and incorporated in the FCC Form 312 has deprived TelQuest of its property or entitlement to an FCC license and its liberty to provide a new DBS service to the American people. Because it was imposed without procedural due process, it violates the Fifth Amendment of the U.S. Constitution and must be invalidated.

B. The Commission's Prior Satellite Licensing Requirement Has Effected a Taking of TelQuest's Property Interests in the DBS Spectrum Without Just Compensation in Violation of the Fifth Amendment.

A taking in violation of the Fifth Amendment of the U.S. is caused by the complete abrogation without compensation of any significant "strand" in the bundle of rights comprising a property interest. Babbitt v. Youpee, 117 S.Ct. 727, 733 (1997). In a recent dissenting opinion, five D.C. Circuit justices indicated that little weight should be given to the government's claimed property interest in the spectrum. Time Warner Entertainment Co., L.P. v. FCC, 1997 WL 47179 (D.C. Cir. Feb. 7, 1997). According to these justices, spectrum is analogous to western water rights which belong to no one, but may be acquired by reason of investment of time and money in application of the resource to productive use.[14] These justices observed:

> "There is, perhaps, good reason for the Court to have hesitated to give great weight to the government's property interest in the spectrum. First, unallocated

[14] See e.g., Colorado River Water Conservation District v. U.S., 96 S.Ct. 1236, 1240 (1976) (explaining that the doctrine of prior appropriation grants superior usage rights to the first appropriation of water who puts it to "beneficial" use).

> spectrum is government property only in the special sense that it simply has not been allocated to any real "owner" in any way. Thus it is more like unappropriated water in the western states, which belongs, effectively, to no one. Indeed, the common law courts had treated spectrum in this manner before the advent of full federal regulation. See Chicago Tribune Co. v. Oak Leaves Broadcasting Station, Ill. Circuit Ct., Cook County, Nov. 17, 1926, reprinted in 68 Cong. Rec. 215-19 (1926) (recognizing rights in spectrum acquired by reason of investment of time and money in application of the resource to productive use, and drawing on analogy to western water rights law)".

Consistent with the practices of Secretary of Commerce Herbert Hoover, Chicago Tribune Co. v. Oak Leaves Broadcasting Station held that de facto property rights to spectrum are created based on the priority-in-use rule: "priority in time creates superiority in right". 68 Cong. Rec. at 219. See also, L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 802 (D.C. Cir. 1948) (holding that an operating broadcast station is protected by the Fifth Amendment from the granting of conflicting facilities to another station). The enactment of the Communications Act and the establishment of the Commission neither expropriated these private property interests in the spectrum nor nationalized the spectrum:

> By virtually all accounts, the commission made legal what Secretary Hoover had accomplished via extralegal authority: it recognized priority-in-use rights to spectrum space...The market is neither purely private nor, in substance, one of government control, but is ruled by a hybrid policy in which spectrum rents are shared by private users and government regulators or their assignees. This distribution makes eminent sense for the two principal transactors, Congress and broadcast license holders, and give both equity "owners" incentives to maximize rent values...In that vested rights were developing and lengthy, costly litigation would have followed had an expropriation of major broadcast license holders occurred, an outright nationalization of airwave property was not a desirable alternative for regulators. Such a course would also have carried the opportunity cost of an immediate loss of support by major broadcasters. It was far better for regulators to award broadcasters generous rents subject to "public interest" discretion in the licensing process that could be partially apportioned by incumbent officeholders. Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum", 33 J.L. & Econ. 133, 166-168 (1990).

An attempt by the government to take title to all the radio spectrum would also violate the First Amendment of the U.S. Constitution. The First Amendment guarantee of freedom of speech was predicated on private ownership of communication resources. It represented a rejection of the sordid history of licensing the printed press by the British government. The government may not take title to all radio spectrum any more than it could take title to all paper and ink, set up a Federal Paper Commission, and license printers to the public. The First Amendment prevents the government from owning all radio spectrum just as it prevents the government from owning the air's ability to carry sound and then requiring individuals who wish to speak in public places to obtain a license from the government.

A private property interest in spectrum is different than a private property interest in an FCC license. But just as zoning regulation can result in an unconstitutional taking of one's land, FCC regulation of the use of one's spectrum that is contrary to the goals of the Communications Act can result in a taking if it bars the owner from making any beneficial use of its spectrum. The application of the prior satellite licensing requirement has caused a per se, categorical taking, as defined in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992), of TelQuest's property interest in the DBS spectrum by denying it any beneficial use in the United States.

Nothing in the federal regulatory scheme precludes a person from acquiring a property interest in spectrum by reason of investment of time and money in application of that resource to

productive use. The Communications Act requires the FCC to issue licenses in order to regulate "the use" of the spectrum,[15] it does not extricate it from the per se, categorical takings analysis of Lucas v. South Carolina Coastal Council.

As discussed above, the right to obtain an FCC license to use one's spectrum is also a property interest protected by the Fifth Amendment to the extent that such a grant is mandated by the "existing rules or understandings" embodied in the Communications Act. When, as in TelQuest's case, a regulation that declares "off-limits" all economically productive or beneficial use of a person's spectrum goes beyond what the relevant principles of the Communications Act would dictate, compensation must be paid to sustain it. See Lucas, 112 S.Ct. at 2901.

The Lucas case involved two residential lots on a South Carolina barrier island, where the owner intended to build single-family homes such as those on the immediately adjacent parcels. However, the state legislature enacted a statute which barred the owner from erecting any permanent habitable structures on his land for the purpose of protecting people and property from storms, high tides and beach erosion. The Supreme Court held that when the owner of property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. Lucas, 112 S.Ct. at 2895.

The analysis in Lucas demands the same result here. Before TelQuest filed its earth station applications, the DBS spectrum using the 91° W.L. orbital position to provide video

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[15] 47 U.S.C.§ 301; see also, Columbia Broadcasting System, Inc. v. Democratic National Comm., 93 S.Ct. at 2093 (distinguishing between government regulation of the use of broadcast spectrum and outright government ownership of spectrum).

programming to the United States had not been allocated to any owner and effectively belonged to no one. Like the property owner in Lucas, TelQuest has invested in the productive use of its property. TelQuest invested substantial time and millions of dollars in hiring employees, acquiring equipment and leasing facilities and prosecuting its earth station applications in order to apply its spectrum to productive use. TelQuest is the first and only entity that has made such investment for the purposes of using the DBS spectrum to access satellites located in the 91° W.L. orbital location to provide video programming to the United States. TelQuest, therefore, acquired a property interest in this spectrum.

TelQuest properly filed FCC Form 493 applications demonstrating that granting it licenses to use its DBS spectrum was required by the public interest standards set forth in the Communications Act. In Lucas, homes were allowed to be built on adjacent property. In TelQuest's case, the Commission had already granted licenses to use the DBS frequencies to others, but from adjacent orbital locations. TelQuest, therefore, had a right to obtain licenses to use its spectrum that was protected by the Fifth Amendment.

The International Bureau summarily dismissed TelQuest's applications invoking the prior satellite licensing requirement, which the Commission has now incorporated into its new FCC Form 312. That regulation has prohibited TelQuest from making any beneficial use of its DBS spectrum, just as the state statute in Lucas required the property owner to keep island idle. As discussed above, that regulation puts TelQuest in a classic Catch-22 because a Canadian satellite license is conditional upon an FCC license, which the FCC will not grant until TelQuest has satisfied all conditions of such a Canadian satellite authorization, including obtaining an FCC license.

TelQuest's constitutionally-protected entitlement--the right to obtain an FCC license and to provide video programming to the American people--has been completely frustrated by this regulation. By requiring TelQuest to sacrifice all economically beneficial uses of its DBS spectrum without just compensation, the Commission has violated the Takings Clause of the Fifth Amendment. To remedy this violation, the Commission should rescind its prior satellite licensing requirement and reinstate and grant TelQuest's earth station applications. Lucas, 112 S.Ct. at 2901, n. 17.

IV. THE COMMUNICATIONS ACT AND REGULATORY FLEXIBILITY ACT.

A. The Report and Order Violates the Communications Act and the Regulatory Flexibility Act by Creating a New Market Entry Barrier for Small Businesses.

Pursuant to §§ 257 and 309(j) of the Communications Act, it is the duty of the Commission to eliminate market entry barriers for small businesses and women-owned businesses. 47 U.S.C. §§ 257 and 309(j). In adopting new regulations, the Regulatory Flexibility Act requires the Commission to consider significant alternatives that minimize the impact on small businesses. 5 U.S.C.§ 603, et seq. These standards are part of the "existing rules and understandings" that secure TelQuest a property right to obtain earth station licenses to use its DBS spectrum.

Rather than provide regulatory flexibility to eliminate the DBS market entry barriers confronting TelQuest, the Commission created a new market entry barrier for this small, women-owned U.S. business by adopting a prior satellite licensing requirement for earth station applications. While identifying TelQuest as only one out of five small satellite businesses, the Commission failed to adopt any alternatives minimizing the impact of the prior satellite licensing

requirement, which in TelQuest's case, has completely barred it from entering the market. Report and Order, slip op. at 49-52. The Commission failed to consider granting TelQuest's earth station applications conditional upon satisfying the conditions of the related Canadian satellite license. Such an alternative would extricate TelQuest from the current Catch-22 in which this new Commission regulation has placed it. TelQuest urges the Commission to eliminate the market entry barrier which it has improperly invoked and expeditiously grant TelQuest's applications. Granting a conditional license would allow TelQuest to move forward in gaining access to capital which has been recognized as critical for small businesses.

V. THE FIRST AMENDMENT OF THE U.S. CONSTITUTION.

A. The Prior Satellite Licensing Requirement Unconstitutionally Infringes on TelQuest's First Amendment Right to Freedom of Speech.

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech." In considering content-neutral regulation of cable operators, the Supreme Court has applied the intermediate scrutiny standard set forth in United States v. O'Brien, 88 S.Ct. 1673 (1968).[16] Under the test articulated in O'Brien, a content-neutral time, place and manner restriction will pass constitutional muster if: (1) it furthers an important or substantial government interest; (2) if the government interest is unrelated to the suppression of free expression; and (3) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 2468, quoting O'Brien, 88 S.Ct.

[16] Turner Broadcasting Systems v. FCC, 114 S.Ct. 2445, 2469 (1994).

at 1679. In addition, the Court will consider whether "ample alternative channels of communication" exist. US West, Inc. v. U.S., 48 F.3d 1092, 1100 (9th Cir. 1995).

At least five justices on the D.C. Circuit agree that the intermediate scrutiny standard applied to cable operators should be applied to DBS, not the relaxed standard of scrutiny that the Court has applied to the traditional broadcast media. "DBS is not subject to anything remotely approaching the 'scarcity' that the Court found in conventional broadcast in 1969 and used to justify a peculiarly relaxed First Amendment regime for such broadcast...Accordingly Red Lion should not be extended to this medium...DBS falls on the cable rather than the broadcast side of the line." Time Warner Entertainment Co., 1997 WL 47179.

Upon consideration of these factors, it is clear that the prior satellite licensing requirement is an unconstitutional infringement on TelQuest's First Amendment rights. This requirement has completely foreclosed TelQuest from exercising its First Amendment right to speak to the American people using a DBS service. All of the DBS orbital positions assigned to the United States by international agreement have already been allocated to other companies. TelQuest has no alternative other than using a Canadian orbital position to provide coverage for the entire continental United States.

Enforcement of the prior satellite licensing requirement, and the resulting barrier to TelQuest's entry into the DBS market, not only fails to promote any important or substantial government interest, but also directly contradicts the stated goal of Congress and the duty of the Commission to promote the entry of small, women-owned U.S. businesses into the telecommunications industry. The infringement on TelQuest's First Amendment freedoms is much greater than necessary as the Commission could condition TelQuest's earth station licenses

upon the satisfaction of the conditions of the related satellite license. Accordingly, the Commission should allow TelQuest to exercise its First Amendment right to freedom of speech by granting its earth station applications.

VI. CONCLUSION.

For all the foregoing reasons, TelQuest urges the Commission to reconsider and rescind its prior satellite licensing requirement for earth station applications and expeditiously reinstate and grant TelQuest's earth station applications.

Respectfully submitted,

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March 12, 1997

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EXHIBIT ONE